

## HOTEL RECAPTURE AGREEMENT

This Recapture Agreement is made as of this \_\_\_\_ day of September, 2015 (the "Agreement"), between the PORT AUTHORITY OF THE CITY OF BLOOMINGTON, a public body politic and corporate organized under the laws of Minnesota (the "Authority"), the CITY OF BLOOMINGTON, MINNESOTA, a Minnesota municipal corporation (the "City"), and SOUTH LOOP INVESTMENTS, LLC, a Minnesota limited liability company (the "Developer"). The Authority, the City, and the Developer are collectively referred to herein as the "Parties."

WHEREAS, the Developer has proposed to acquire certain property from the Authority located in the City for the development of certain improvements thereon to be completed in two phases (defined herein as the "Minimum Improvements"), including (i) an approximately 74,000 square foot hotel, including approximately 148 units (the "Hotel"), an approximately 2,000 square foot coffee shop (the "Coffee Shop"), an approximately 9,500 square foot restaurant (the "Restaurant"), approximately 81 surface parking spaces, and a public plaza area; (ii) a structured parking ramp with approximately 320 parking spaces (the "Parking Ramp," and collectively with the construction projects listed in clause (i), the "Phase I Minimum Improvements"); and (iii) an approximately 14,500 square foot grocery or pharmacy and approximately 21 surface parking spaces (the "Phase II Minimum Improvements," and collectively with the Phase I Minimum Improvements, the "Minimum Improvements"); and

WHEREAS, in order to make the Minimum Improvements economically feasible, the Authority, the City, and the Developer entered into a Purchase and Redevelopment Contract, dated December 10, 2014 (the "Redevelopment Contract"), as amended by the First Amendment to Purchase and Redevelopment Contract, dated September \_\_, 2015; and

WHEREAS, pursuant to the Redevelopment Contract, the City and the Authority have agreed to finance the costs of the Parking Ramp (defined herein) in the amount of up to \$5,749,739 with moneys from the South Loop Development Fund; and

WHEREAS, in consideration of the assistance provided by the Authority and the City and described in the Redevelopment Contract, the Developer has agreed to enter or cause its assignee to enter into a recapture agreement for each of the following three components of the Minimum Improvements: the Hotel, the Coffee Shop and Restaurant, and the Phase II Minimum Improvements.

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants and agreements hereinafter set forth herein, it is hereby agreed by and between the Parties hereto as follows:

### Section 1. Definitions

Capitalized terms not defined herein shall have the meaning given such terms in the Redevelopment Contract. For the purposes of this Agreement, the Parties agree that the following terms are defined as set out below:

Affiliate means any person or entity that is directly or indirectly (i) Controlled by the Developer; or (ii) Controlled by the Developer's equity owner, Mercury Investments Limited Partnership, a Utah limited partnership, or its subsidiary or controlling companies.

Base Line Valuation means the projected value of the Hotel in future years based on projected revenues of the Hotel and the Capitalization Rate. The Base Line Valuation for each year of the Term of Available Recapture is set out in Exhibit B.

Capitalization Rate means eight and one half percent (8.5%).

Capital Lease means a lease in which the lessor agrees to transfer the ownership rights in the Hotel leased to the lessee at the termination of the lease period.

Controlled means having the ability through ownership of voting securities, trust agreements or otherwise to direct the management and policies of the person or entity.

Excess Amount means (i) for purposes of a Recapture without Sale as described in Section 4, the amount by which the Yield on Imputed Sale exceeds the Base Line Valuation by more than twenty-five percent (25%); and (ii) for purposes of a Recapture upon Sale as described in Section 5, the amount by which the Yield on Sale exceeds the Base Line Valuation by more than twenty-five (25%).

Hotel means an approximately 74,000 square foot hotel, including approximately 148 units to be constructed by the Developer on the Hotel Property.

Hotel Property means Parcel 1, as described in Exhibit A attached hereto.

Imputed Sales Price means the actual Net Operating Income for the most recently completed fiscal year of the Developer derived from the Hotel, divided by the Capitalization Rate.

Lookback Calculation Date means 60 days after (i) the date of any Sale, if such Sale occurs three years or more after the issuance of the certificate of occupancy for the Hotel; or (ii) the date which is 3 years after the date of issuance of the certificate of occupancy for the Hotel.

Market Value Determination unless agreed upon by the Parties within thirty (30) days after a Sale, the market value shall be determined by appraisal, made by a market value board consisting of three (3) independent reputable real estate appraisers experienced in the valuation of commercial properties similar to the Hotel in the Minneapolis/St. Paul metropolitan area, each of whom shall be a member of the Appraisal Institute with the designation of "MAI." The market value will be the most probable price, as of the date of the closing of the Sale, in cash, for which the Hotel should sell after reasonable exposure in a competitive market under all conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under any duress. The market value determination should not exclude the business enterprise value or brand value of the Hotel. One appraiser shall be appointed by the Authority and the City, and a second appraiser shall be appointed by the Developer. The Developer shall provide notice to the City and the Authority within ten (10) days after its first appointment. The City and the Authority shall provide notice to the Developer within ten (10) days after its first appointment. The third appraiser shall be appointed by mutual consent of the first two appraisers. If the first two appraisers are unable to agree on a third appraiser within twenty (20) days after the appointment of the second appraiser, or if the Developer or the City and the Authority refuse or neglects to appoint an appraiser as herein provided, then such appraiser whose appointment was not made as aforesaid shall be appointed within ten (10) days by the President of the Appraisal Institute, or by such successor body hereafter constituted exercising similar functions. The members of the market value board, acting independently, shall each determine the market value of the Hotel, and within sixty (60) days after the appointment of the third appraiser, shall each submit their determination of such market value to the Authority, the City, and the Developer. If the determinations of at least two (2) of the appraisers shall be within one percent (1%) in amount, the average of such amount shall be deemed to be the market value. If the determinations of all three (3) appraisers shall be different in amount, the market value shall be determined as follows:

(a) If neither the highest nor lowest appraised value differs from the middle appraised value by more than ten percent (10%) of such middle appraised value, or both the highest and lowest appraised values differ from the middle appraised value by more than ten percent (10%) of such middle appraised value, then the market value shall be deemed to be the average of the three appraisals;

(b) If either, but not both, of the highest and lowest appraised values differs from the middle appraised value by more than ten percent (10%) of such middle appraised value, then the market value shall be deemed to be the average of the middle appraised value and the appraised value closest in amount to said middle value.

The market value as determined in accordance with the provisions of this subsection shall be binding and conclusive upon the Parties hereto. The Authority and the City shall pay fifty percent (50%) and the Developer shall pay fifty percent (50%) of all expenses incurred in connection with the market value board, including the reasonable fees of all three appraisers.

Net Operating Income means all net operating income from the Hotel. The projected net operating income from the Hotel for each year of the Term of Available Recapture is set out in Exhibit B.

Parking Ramp means a structured parking ramp constructed on the Parking Ramp Property with approximately 320 parking spaces with substantially the size, features and standards specified on Exhibit F attached to the Redevelopment Contract.

Parking Ramp Property means the real property upon which the Parking Ramp will be constructed which is adjacent to the Hotel Property.

Recapture means the payment to the Authority and the City of a portion of the Excess Amount.

Sale means any total or partial sale, assignment, conveyance, or Capital Lease, or substantially similar transfer with respect to the Hotel or the Hotel Property or any part thereof or any real property interest therein, or any contract or agreement to do any of the same; provided however, a transfer of the Hotel by foreclosure or a deed-in-lieu of foreclosure will not be a Sale. The term Sale does not include: (i) any transfer of the ownership of the Hotel (or any portion thereof) if the transferee is an Affiliate, (ii) the transfer of membership interests in the Developer (or any portion thereof) or its members to Affiliates, (iii) a management agreement for the operations of the Hotel, (iv) mortgages, liens or encumbrances securing debt, and (v) a transfer of a de minimus amount of property (e.g. conveyance of right of way to a government entity or an easement to a neighboring property owner). For the avoidance of doubt, a Sale includes any lease-purchase agreement executed within the Term of Available Recapture with parties that are not Affiliates regardless of when or if the eventual sale is transacted. A Sale shall not include property conveyed pursuant to a condemnation or similar action. A temporary transfer to an agent for the purposes of a 1031 exchange does not constitute a Sale.

Sale Price means the actual price at which the Hotel is sold, less (i) deductions for customary closing costs and (ii) any new capital invested in the Hotel after the opening date of the Hotel; provided, that if (x) if the Developer or any Affiliate thereof has an ownership interest in the purchaser of the Hotel, and (y) the Authority and the City notify the Developer in writing within 15 days of receiving notice from the Developer under Section 3 hereof that it does not believe that the actual price of the Hotel represents market value, then the sale price shall be deemed to be market value determined by the Market Value Determination procedure.

Stabilization means the date upon which the Hotel has operated for at least twenty-four (24) months following receipt of its certificate of occupancy.

Term of Available Recapture means the period commencing at Stabilization of the Hotel until the three (3rd) anniversary thereof.

Total Project Costs means all costs incurred by Developer in connection with the Hotel as of the Calculation Date, including allocated costs of land, on-and-off-site improvements (or assessments paid in connection with such improvements), leasing commissions, capitalized interest on all such costs, and operating deficits, and all other related soft costs incurred in connection with the Hotel, not including the costs of constructing the Parking Ramp born by the City and the Authority.

Yield on Imputed Sale means the Imputed Sale Price less the Base Line Valuation.

Yield on Sale means the amount by which the Sale Price exceeds the Base Line Valuation.

## **Section 2. Recapture Generally.**

The financial assistance provided to the Developer by the Authority and the City pursuant to the Redevelopment Contract is based on certain assumptions regarding likely costs and expenses associated with acquiring and constructing the Hotel. The Authority, the City, and the Developer agree that those assumptions will be reviewed at the times described in this Agreement, and that the amount of public assistance provided under the Redevelopment Contract may be adjusted accordingly.

## **Section 3. Notification in Event of Transfer**

In the event of any Sale of the Hotel during the Term of Available Recapture, the Developer shall notify the Authority and the City of the time and place of the closing of the Sale at least 30 days before the Sale will occur. The Developer must deliver to the Authority and the City any background documentation related to the Sale as the Authority and the City may reasonably request, including but not limited to any appraisal of the Hotel.

## **Section 4. Recapture Without Sale**

(a) On the Lookback Calculation Date, the Authority and the City shall calculate the Imputed Sale Price based on the Net Operating Income reported by the Developer for the most recently completed fiscal year of the Developer using the Capitalization Rate. For purposes of calculating the Imputed Sale Price, the Developer shall provide to the Authority and the City a report regarding the Hotel's Net Operating Income in substantially the format of the lookback pro forma attached as Exhibit B hereto (except that if definitions in this Agreement vary from GAAP, the provisions of this Agreement control) for the most recently completed fiscal year. The Developer's current fiscal year ends on December 31. The pro forma shall include rent paid by tenant/operators of the Hotel in the form set out in Exhibit B. Upon request, the Developer agrees to provide to the Authority and the City background documentation reasonably related to the financial data, including at a minimum three years of revenues and expenses comprising Net Operating Income. The Authority and the City may request a written certificate from an accounting firm of independent certified public accountants verifying the Net Operating Income calculations of the Developer, to be provided at the Developer's expense (which expense may be included as part of Total Project Costs).

(b) If an Excess Amount exists, the Developer shall pay to the Authority and the City 50% of the Excess Amount as and for Recapture, subject to the terms of Section 6. The Developer shall have five years in which to pay the Recapture after the Lookback Calculation Date, (payable without interest in ten (10) equal semi-annual payments commencing within six months of the Lookback Calculation Date).

## **Section 5. Recapture Upon Sale**

(a) In case of a Sale, the Developer agrees to pay to the Authority and the City 50% of the Excess Amount as and for Recapture, subject to the terms of Section 6.

(b) Developer agrees to provide to the Authority and the City any background documentation reasonably related to the Sale and certain financial data, upon request which will include at a minimum three years of revenues and expenses comprising Net Operating Income for the most three previous fiscal years of the Developer. For purposes of analyzing the proposed Sale Price, the Developer shall provide to the Authority and the City a report regarding the Hotel's Net Operating Income in substantially the format of the lookback pro forma attached as Exhibit B hereto (except that if definitions in this Agreement vary from GAAP, the provisions of this Agreement control) for the most recently completed fiscal year. The pro forma shall include rent paid by tenant/operators of any Component of the Hotel in the form set out in Exhibit B. Upon request, the Developer agrees to provide to the Authority and the City background documentation reasonably related to the financial data, including at a minimum three years of revenues and expenses comprising Net Operating Income. The Authority and the City may request a written certificate from an accounting firm of independent certified public accountants verifying the Net Operating Income calculations from the Developer, to be provided at the Developer's expense (which expense may be included as part of Total Project Costs).

(c) The amount of Recapture due and owing under this Section 5 must be paid within thirty (30) days of a Sale.

## **Section 6. Total Recapture**

(a) Notwithstanding anything to the contrary contained herein, in no event shall the total Recapture paid to the Authority and the City under this Agreement exceed \$1,292,373 (the Hotel Improvements requires 45% of the parking provided in the Parking Ramp). A maximum of 50% of the public investment in the Parking Ramp is required for recapture under this Recapture Agreement.

(b) Any amounts of Recapture paid to the Authority and the City pursuant to this Agreement shall be deposited to the South Loop Development Fund.

## **Section 7. Term**

This Agreement shall terminate automatically, without further action of the Parties, on the earlier to occur of (a) payment, if any, of Recapture at the end of the Term of Available Recapture (except when payments are required as in Section 4(b) then the Term expires when all payments for Recapture have been received), (b) payment to the Authority and the City of Total Recapture in the amount of \$1,292,372.50 under this Agreement, (c) a foreclosure or deed in lieu of foreclosure of a lien on the Hotel, or (d) sixty (60) days after the expiration of the Term of Available Recapture, provided however, this Agreement shall not be terminated until payments due and owing under Section 4(b) have been paid in full.

## **Section 8. Amendment/Waiver**

This Agreement may only be amended by written document executed by each party hereto or their successors and assigns. No term of this Agreement shall be waived or deemed waived unless done so in writing signed by the party benefited by the term to be waived.

## **Section 9. Notices**

All notices and other communications under or relating to this Agreement shall be given in the manner and to the respective Parties at their respective addresses as set forth in the Redevelopment Contract.

## **Section 10. Assignment of Hotel**

If the Hotel is sold, transferred or otherwise conveyed to another owner prior to Stabilization, then the obligations hereunder shall be assumed by the new owner.

## **Section 11. Miscellaneous**

(a) This Agreement does not represent an interest in the Hotel, and the Authority, the City, and the Developer are not partners. The rights of the Authority and the City to payment hereunder are binding on the Developer and its successors. The rights of the Authority and the City to payment hereunder are and shall in all cases be and remain subordinate to the rights, liens, assignments and security interests of any holder of indebtedness secured by the Hotel, or any part thereof. Any subordination agreement requested by such lienholders shall be subject to such commercially reasonable terms and conditions as the Authority, the City and the lienholder mutually agree to in writing and must be approved by the City Council and the Board of the Authority.

(b) The provisions of this Agreement are binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns.

(c) This Agreement shall be construed under and governed by the laws of the State of Minnesota.

(d) This Agreement may be executed in counterparts, all of which taken together shall constitute one and the same instrument.

(e) This Agreement may be recorded against the Hotel Property in the property records of Hennepin County.

## **Section 12. No Lien**

The Parties agree that this Agreement does not constitute a lien, claim, encumbrance or charge against the Hotel Property or rents or other income generated by the Hotel Property, and is payable only as set forth in Sections 4 and 5 hereof. Upon payment to the Authority and the City of any Recapture, the Authority and the City shall deliver a certificate acknowledging receipt of payment in form and substance reasonably acceptable to Developer. Such certificate shall be in recordable form and shall evidence that all payments required to be made to the Authority and the City have in fact been made.

IN WITNESS WHEREOF, the Authority and the Developer have each caused these presents to be signed in its name on behalf by its authorized representatives, all as of the day and year first written above.

**PORT AUTHORITY OF THE CITY OF  
BLOOMINGTON**

By \_\_\_\_\_  
Robert Erickson  
Its President

By \_\_\_\_\_  
Schane Rudlang  
Its Administrator

STATE OF MINNESOTA    )  
  ) ss.  
COUNTY OF HENNEPIN    )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of September, 2015, by Robert Erickson, the President of the Port Authority of the City of Bloomington, under the laws of the State of Minnesota, on behalf of the Authority.

\_\_\_\_\_  
Notary Public

STATE OF MINNESOTA    )  
  ) ss.  
COUNTY OF HENNEPIN    )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of September, 2015, by Schane Rudlang, the Administrator of the Port Authority of the City of Bloomington, under the laws of the State of Minnesota, on behalf of the Authority.

\_\_\_\_\_  
Notary Public

Reviewed and approved by Port General Counsel.

\_\_\_\_\_  
Julie Eddington  
Port General Counsel

This document was drafted by:  
KENNEDY & GRAVEN, CHARTERED (JAE)  
470 U.S. Bank Plaza  
200 South Sixth Street  
Minneapolis, Minnesota 55402  
Telephone: (612) 337-9300

**THE CITY OF BLOOMINGTON**

By \_\_\_\_\_  
Gene Winstead  
Its Mayor

By \_\_\_\_\_  
James D. Verbrugge  
Its City Manager

STATE OF MINNESOTA    )  
  ) ss.  
COUNTY OF HENNEPIN    )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of September, 2015, by Gene Winstead, the Mayor of the City of Bloomington, a Minnesota municipal corporation, on behalf of the City.

\_\_\_\_\_  
Notary Public

STATE OF MINNESOTA    )  
  ) ss.  
COUNTY OF HENNEPIN    )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of September, 2015, by James D. Verbrugge, the City Manager of the City of Bloomington, a Minnesota municipal corporation, on behalf of the City.

\_\_\_\_\_  
Notary Public

Reviewed and approved by the City Attorney.

\_\_\_\_\_  
Sandra Johnson  
City Attorney

Signature Page of City for Hotel Recapture Agreement



**SOUTH LOOP INVESTMENTS, LLC**

By \_\_\_\_\_  
David W. Peters  
Its Chief Manager

STATE OF MINNESOTA     )  
  ) ss.  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of September, 2015, by David W. Peters, the Chief Manager of South Loop Investments, LLC, a Minnesota limited liability company, on behalf of the limited liability company.

\_\_\_\_\_  
Notary Public

Signature Page of Developer for Hotel Recapture Agreement

## **EXHIBIT A**

### **HOTEL PROPERTY DESCRIPTION**

Lot 1, Block 1, Lindau Link 2ND Addition according to the recorded plat thereof, Hennepin County, Minnesota.

## Exhibit B: AC Marriott Hotel Recapture Agreement

	Year 1	Year 2	Stabilized Year 3	Year 4
Total Sales	\$ 5,378,022	\$ 5,964,616	\$ 6,640,980	\$6,811,276
Total Expense	\$ 3,348,598	\$ 3,772,896	\$ 4,204,147	\$4,321,325
Income from Operations	\$ 2,029,425	\$ 2,191,720	\$ 2,436,833	\$2,489,951
Replacement Reserve	\$ (234,116)	\$ (259,689)	\$ (288,996)	\$ (296,221)
<b>Net Operating Income</b>	<b>\$ 1,795,309</b>	<b>\$ 1,932,032</b>	<b>\$ 2,147,836</b>	<b>\$2,193,729</b>

<b>Base Line Valuation</b>	<b>\$22,730,000</b>	<b>\$25,269,000</b>	<b>\$25,809,000</b>	
<b>Recapture Threshold EFI (NOI)</b>				
Base + 25%	\$2,244,136	\$2,415,040	\$2,684,796	\$2,742,162
<b>Recapture Threshold for imputed sale</b>	<b>\$28,412,000</b>	<b>\$31,586,000</b>	<b>\$32,261,000</b>	

Capitalization Rate	8.5%
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